No. 93-519

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LIESCHULTZ FAST FREIGHT, INC.,
Petitioner,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, YELLOW FREIGHT SYSTEMS, INC. and ROADWAY EXPRESS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly concluded that hearsay statements were not admissible under Federal Rule of Evidence 801(d)(2)(E).

2. Whether the courts below correctly concluded that petitioner failed to present evidence of a conspiracy that created a genuine issue of material fact.

3. Whether the filed rate doctrine bars petitioner's antitrust challenge to rates and tariffs subject to regulation by the Interstate Commerce Commission.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties.

Consolidated Freightways Corporation of Delaware is a wholly-owned subsidiary of Consolidated Freightways, Inc., and has one subsidiary not wholly owned, Transportes CF, S.A. (Consolidated Freightways, Inc. has two subsidiaries not wholly owned: Emery Receivables Corp. and Transportes EWW, S.A.)

Yellow Freight System, Inc. is a wholly-owned subsidiary of Yellow Corporation.

Roadway Express, Inc. is a wholly-owned subsidiary of Roadway Services, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
A. Proceedings Below	2
B. Statement of the Facts	3
REASONS FOR DENYING THE WRIT	5
I. THE DECISION BELOW CORRECTLY EXCLUDED HEARSAY TESTIMONY UNDER THIS COURT'S PRECEDENTS	6
II. THE DECISION BELOW CORRECTLY DETERMINED THAT NO GENUINE ISSUE OF MATERIAL FACT WAS SHOWN	8
III. THIS IS NOT AN APPROPRIATE CASE FOR REVIEW OF THE FILED RATE DOCTRINE	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 8, 9
Black v. Cutter Laboratories, 351 U.S. 292 (1956) .. 11
Bourjaily v. United States, 483 U.S. 171 (1987) 6, 7
Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993) 10
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 3, 9
Earle v. Benoit, 850 F.2d 836 (1st Cir. 1988) 7
Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072 (1992) 10
Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) .. 11
In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991) 8, 9
In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 656 F. Supp. 1296 (C.D. Cal. 1986) 8
In re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144 (3d Cir. 1993), *pet. for cert. filed sub nom. Bessemer & Lake Erie R.R. v. Republic Steel Corp.* (No. 93-643, filed October 25, 1993) 11
Investigation of Motor Carrier Collective Ratemaking and Related Practices and Procedures, 7 I.C.C.2d 388 (1991) 4
Keogh v. Chicago & Northwestern Ry., 260 U.S. 156 (1922) 10, 11, 12
Maislin Industrial, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 11
Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 9, 10
Pinney Dock & Transport Corp. v. Penn Central Corp., 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988) 11, 12
Precision Piping & Instruments, Inc. v. E.I. Du-Pont de Nemours & Co., 951 F.2d 613 (4th Cir. 1991) 8
Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) 11

TABLE OF AUTHORITIES—Continued

	Page
United States v. Barletta, 652 F.2d 218 (1st Cir. [illegible])	7
United States v. Matlock, 415 U.S. 164 (1974)	7
STATUTES	
Sherman Act, 15 U.S.C. §§ 1, 2	2
Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961 *et seq.*	2
28 U.S.C. § 1254(1)	1
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980), *codified at* 49 U.S.C. §§ 10101, *et seq.*	3
South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-20	2
RULES	
Fed. R. Civ. P. 12(b)(6)	3
Fed. R. Civ. P. 56(c)	3
Fed. R. Evid. 104(a)	2, 3, 6, 7, 8
Fed. R. Evid. 803(d)(2)(E)	2, 6
MISCELLANEOUS	
McCormick on Evidence (John W. Strong ed.) (4th ed. 1992)	9

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A6) is unreported, but the judgment is noted at 998 F.2d 1009 (Table). The opinion of the district court (Pet. A7-A42) is reported at 805 F. Supp. 1277.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1993. The petition for a writ of certiorari was filed on October 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Lifschultz Fast Freight, Inc., filed this action alleging that respondents, three trucking companies, conspired among themselves and with the International Brotherhood of Teamsters to destroy hundreds of motor carriers, in order to eliminate competition and to monopolize the "less than truckload" segment of the trucking business. Petitioner asserted claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*; and the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-20.

After years of discovery, the district court granted respondents' motion for summary judgment on the antitrust claims on three independent grounds.[1] First, the court excluded the hearsay testimony of Lifschultz' two principal witnesses, Glenn Hall and Ralph Picardo, pursuant to Federal Rule of Evidence 104(a). The testimony was not admissible under the co-conspirator exception of Federal Rule of Evidence 801(d)(2)(E) because Lifschultz failed to meet its burden of demonstrating the existence of the alleged conspiracy. Pet. A15-A16. Because the antitrust conspiracy claims depended upon the hearsay testimony, the exclusion of that testimony required judgment in respondents' favor on those claims. Pet. A16.

Second, the court held that respondents would be entitled to summary judgment on the antitrust claims even if the hearsay testimony were admissible. The court concluded that, even taking the disputed testimony into account, Lifschultz had not presented evidence showing

[1] The district court granted summary judgment on the RICO and state law claims as well. Lifschultz does not challenge those rulings in its petition, and those claims have been abandoned.

the existence of the alleged conspiracy. Further, there was no evidence of unlawful predatory pricing or that Lifschultz had suffered any antitrust injury. Pet. A3-A4, A16-A23, A41. Summary judgment was appropriate because no genuine issue of material fact existed as to a number of essential elements of the antitrust claims.

Third, the district court ruled that Lifschultz' claims were barred by the filed rate doctrine as improper collateral attacks on rates and tariffs subject to ICC regulation. Pet. A35-A39.

The court of appeals affirmed in an unpublished *per curiam* opinion, stating that the district court's opinion was "thorough and well reasoned" and that summary judgment was "appropriate." Pet. A5-A6.

B. Statement of the Facts [2]

Respondents are motor carriers specializing in carrying "less than truckload" freight. Lifshultz did not become a motor carrier until 1980. Prior to 1980, Lifschultz operated as a "freight forwarder," relying on common carriers, primarily railroads, to move freight between cities.

The trucking industry was deregulated by the Motor Carrier Act of 1980,[3] which gave trucking companies the freedom to enter new markets and to engage in more extensive and more vigorous price competition. As expected, deregulation had a substantial effect on the in-

[2] Lifschultz asserts (Pet. 6-7 n.1) that its statement of facts must be taken as true for purposes of summary judgment, and that the district court's Rule 104(a) decision is an evasion of that rule. Neither proposition is correct. Plaintiff's allegations must be taken as true for purposes of a Rule 12(b)(6) motion to dismiss, not for a summary judgment motion under Rule 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 325 (1986). Second, the district court properly applied Rule 104(a) only to a preliminary question concerning the admissibility of evidence.

[3] Pub. L. No. 96-296, 94 Stat. 793 (1980), *codified at* 49 U.S.C. §§ 10101, *et seq.*

dustry. Many carriers failed because they were unable to adapt to this new competive regime.[4] Lifschultz became unprofitable soon after the industry was deregulated. Lifschultz asserted, however, that its troubles were due to a conspiracy, instigated by the Teamsters in the early 1960s and continuing until at least 1990, in which the Teamsters and respondents supposedly collaborated in running other motor carriers, including Lifschultz, out of business.

Lifschultz alleged that, beginning in the early 1960s and continuing until 1980, the conspiracy created a list of small carriers to be "hit" with "illegitimate Teamster strikes and interruptions of service," while the Teamsters gave respondents labor concessions. Pet. 8. There was no evidence, however, that Lifschultz or other small carriers were "hit" with such actions. The evidence showed that Lifschultz had very few Teamsters employees, and that it received highly favorable contract terms from the union. C.A. App. 1301-15. There was no evidence that respondents received labor concessions.

Lifschultz also alleged that, prior to 1980, respondents controlled rate bureaus to set low rates to create a "price squeeze" on small carriers making it impossible for them to compete. Pet. 9. There was no evidence, however, that respondents controlled the rate bureaus, or that they voted against rate increases or did anything else to hold rates down. Nor did the evidence show that it was "impossible" to compete: Indeed, Lifschultz was profitable prior to deregulation in 1980, and there were hundreds of motor carriers transporting "less than truckload" freight. C.A. App. 1121, 1383.

Lifschultz next alleged that, after 1980, respondents conspired to charge below-cost, predatory prices. There

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[4] *See, e.g., Investigation of Motor Carrier Collective Ratemaking and Related Practices and Procedures*, 7 I.C.C.2d 388, 393-94, 407-09 (1991).

was no evidence whatsoever to show this alleged conspiracy. It is true that price competition became more intense after deregulation in 1980. Congress intended that price competition would increase markedly, and one result was that excess capacity—and therefore some competitors—exited the business. The undisputed evidence showed, however, that defendants were consistently profitable on a national basis and in the areas where Lifschultz operated. *E.g.*, C.A. App. 1366-67, 1398-1422, 1486-88. On this record, as the district court recognized, there is no basis for concluding that petitioner's demise was due to anything other than the deregulation of the industry, Lifschultz' change from freight forwarder to a motor carrier in 1980, or "simply bad management." Pet. A22.

REASONS FOR DENYING THE WRIT

The court of appeals' unpublished, *per curiam* decision below is correct, entirely in accord with the decisions of this Court, and does not meaningfully conflict with any decision of another court of appeals. In addition, as the court of appeals below recognized, the district court's ruling rested on several alternate grounds, any one of which is sufficient to support the judgment.[5] Despite Lifschultz' attempts to clothe its petition with rhetoric about conflicts, the rulings of the courts below rest on the application of well-settled principles, established in decisions by this Court and by the courts of appeals, to a specific set of facts. Lifschultz' claims were dismissed because there was no evidence to support them, not because of any misapplication of governing law. No further review is warranted.

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[5] Petitioner does not contend that the courts below erred in concluding that there was no evidence of below-cost pricing meaningfully affecting competition, and that Lifschultz had suffered no antitrust injury. Pet. A3-A4; A16-A23. The first finding is dispositive of Lifschultz' claims of a predatory pricing conspiracy; the second is dispositive of all of Lifschultz' antitrust claims.

I. THE DECISION BELOW CORRECTLY EXCLUDED HEARSAY TESTIMONY UNDER THIS COURT'S PRECEDENTS.

The district court, after carefully considering all the evidence pursuant to Rule 104(a), held that the hearsay testimony of Lifschultz' principal witnesses, Glenn Hall and Ralph Picardo, was not admissible under Rule 801 (d)(2)(E) as statements made by co-conspirators in the course of and in furtherance of the conspiracy. Pet. A15-A16. The district court's ruling can only be set aside if it was "clearly erroneous," *Bourjaily v. United States*, 483 U.S. 171, 181 (1987); the court of appeals correctly left it undisturbed. Lifschultz nonetheless argues (Pet. 13-17) that the district court improperly weighed the credibility of that testimony in making its preliminary determination under Rule 104(a) concerning the existence of the alleged conspiracy.

In determining whether a conspiracy existed, the district court followed the direction of this Court in *Bourjaily* to evaluate all of the available evidence, including the hearsay testimony of Hall and Picardo. 483 U.S. at 178-81; Pet. A15. Hall was a former truck driver who was fired by Roadway in 1965. He never held any Teamsters office higher than local shop steward. Picardo is a convicted murderer and admitted perjurer who had been a gangster in a New Jersey crime family, the Provenzano group, until 1975. Lifschultz' assertions that Hall or Picardo had conversations about the conspiracy with officers or employees of respondents, or were personally involved in actions furthering the conspiracy (Pet. 11-12), are erroneous and not supported by record evidence. Neither Hall nor Picardo presented any evidence that respondents agreed among themselves to the conspiracy alleged by Lifschultz. Pet. A17. The district court concluded, after considering *all* the evidence—which included the Hall and Picardo testimony and a mass of evidence refuting the existence of the alleged conspiracy—that Lifschultz had not proven that

the conspiracy it alleged among respondents and the Teamsters existed. Pet. A15-A16.

There would be no reason to grant the writ even if Lifschultz were correct that the district court weighed the credibility of the Hall and Picardo testimony in deciding the motion under Rule 104(a).[6] *Bourjaily* directs the trial court to act as a factfinder to "evaluate [the hearsay statements] for their evidentiary worth," 483 U.S. at 180, giving the hearsay evidence "such weight as [the court's] judgment and experience counsel." *Id.* at 181 (quoting *United States v. Matlock*, 415 U.S. 164, 175 (1974)). Thus, even if Lifschultz were correct that the district court weighed the credibility of the Hall and Picardo testimony, that would be no more than a straightforward application of the instructions of this Court in *Bourjaily*.[7]

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[6] In fact, the district court explicitly stated that it reached its conclusion that Lifschultz had failed to prove the alleged conspiracy only after considering all the evidence "in the light most favorable to the plaintiff." Pet. A15.

[7] Lifschultz argues that, if trial courts act as factfinders in Rule 104(a) determinations in this way, they would have "veto power" to prevent a jury from hearing a witness "every time" a government prosecution relies on an "accomplice" or "unsavory" witness. Pet. 16. There is no basis for that sweeping assertion. *Bourjaily* expressly contemplates that trial courts will act as factfinders, and there is no reason to believe that it has hampered prosecutions.

United States v. Barletta, 652 F.2d 218 (1st Cir. 1981), cited by Lifschultz, presents no conflict for resolution by this Court. *Barletta* was decided long before this Court's controlling *Bourjaily* decision, and has been substantially undermined by subsequent decisions of the First Circuit. *See Earle v. Benoit*, 850 F.2d 836, 840-41 (1st Cir. 1988) (holding that Rule 104(a) determinations are made by the judge, not the jury).

Lifschultz also seems to suggest that the issues here raise Sixth Amendment concerns. Pet. 16-17. The Sixth Amendment has no application to this civil case, and it is well established that the Seventh Amendment does not bar summary judgment, or the exclusion of hearsay, in appropriate cases.

The court of appeals' decision does not conflict with the Ninth Circuit's decision in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991). To begin with, Lifschultz erroneously asserts that the decision below "relied on" *Precision Piping & Instruments, Inc. v. E.I. DuPont de Nemours & Co.*, 951 F.2d 613 (4th Cir. 1991), a decision that supposedly conflicts with *Petroleum Products*. Pet. 13-14. But the court of appeals here did not cite *Precision Piping* at all, and the district court cited it only for the unremarkable proposition that a conspiracy must be shown for the co-conspirator exception to apply. Pet. A15. In any case, the language from the *Petroleum Products* decision that Lifschultz quotes in its petition (Pet. 14-15) does not conflict with anything *Precision Piping* or the decision below had to say about evaluation of evidence under Rule 104(a). As the language quoted by Lifschultz makes clear, the Ninth Circuit was addressing the standards that govern a district court's grant of summary judgment, not a Rule 104(a) determination. *Petroleum Products*, 906 F.2d at 459; *Petroleum Products*, 656 F. Supp. 1296, 1302-03 (C.D. Cal. 1986) (district court determination on summary judgment, not admissibility under 104(a)). Moreover, the Fourth Circuit's *Precision Piping* nowhere cites the earlier *Petroleum Products* decision or otherwise indicates that it saw any conflict with the Ninth Circuit.

II. THE DECISION BELOW CORRECTLY DETERMINED THAT NO GENUINE ISSUE OF MATERIAL FACT WAS SHOWN.

The district court also held that, even if the excluded testimony were admissible, Lifschultz' evidence was insufficient to raise a genuine issue of material fact. Pet. A23, A40-A41. That conclusion, once again, was the result of the straightforward application of well-settled precedent of this Court. *See* Pet. A40-A41, citing *Ander-*

son v. Liberty Lobby, Inc., 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Lifschultz argues, however, that the decision below conflicts with the *Petroleum Products* decision of the Ninth Circuit, because the grant of summary judgment rested on a finding that the testimony of Hall and Picardo was "incredible." Pet. 18-19. This argument mischaracterizes the rulings below.

The district court did not rest its summary judgment ruling on a finding that the Hall and Picardo testimony was "incredible." Instead, the district court carefully reviewed that testimony and found that neither Hall nor Picardo offered any direct evidence that any employee of defendants was involved in the conspiracy, or that defendants ever agreed among themselves to conspire with the Teamsters. Pet. A17.[8] The court of appeals' summary affirmance specifically cites these findings, and not any supposed evaluation of the credibility of the Hall and Picardo testimony, as the basis for the district court's grant of summary judgment. Pet. A3. The district court correctly applied the settled standards for summary judgment to determine that, viewing the evidence in the light most favorable to the plaintiff, there was no genuine issue of material fact as to the existence of the conspiracy Lifschultz had alleged. With no triable issue on this essential

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[8] Lifschultz seems to assume that all testimony is necessarily direct evidence rather than circumstantial evidence. That is incorrect. Circumstantial evidence is *any* evidence, testimonial or not, that requires a process of inference to reach a conclusion about the material fact in issue. "Direct evidence is evidence which, if believed, resolves a matter in issue [without further inference]. Circumstantial evidence may also be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the proposition to which it is directed." *McCormick on Evidence* (John W. Strong ed.) (4th ed. 1992) (footnote omitted).

element of its claim, summary judgment was appropriate. A40-A41.[9]

The claims Lifschultz has raised in this case rely on theories (unsupported by evidence) that are very similar to those this Court considered at length—and rejected—in *Matsushita* and in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993). There is no reason for this Court to revisit those issues. And nothing in the Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992) calls into question the decisions below in this case. *Eastman Kodak* dealt with "facially anticompetitive" actions of a single firm under the antitrust laws, and specifically reaffirmed the approach of *Matsushita* to evaluating claims of predatory pricing conspiracies like those at issue here—claims that attack low prices, "'the very conduct the antitrust laws are designed to protect.'" *Id.* at 2088 (quoting *Matsushita*, 475 U.S. at 594).

III. THIS IS NOT AN APPROPRIATE CASE FOR REVIEW OF THE FILED RATE DOCTRINE.

Lifschultz asserts that the district court improperly barred its antitrust claims under the filed rate doctrine of *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922) and that there is a conflict among the courts of appeals concerning whether the filed rate doctrine should bar suits by competitors as well as customers. Pet. 20-23.

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[9] Even if Lifschultz were correct that Hall and Picardo provided some direct evidence that the alleged conspiracy existed (and they did not), the grant of summary judgment was still correct. Lifschultz hangs its entire petition on the district court's use of the word "incredible." This is not reversible error, much less a legal issue deserving of review by this Court. It is no more than an ordinary application of settled summary judgment standards: a determination that, even viewing the testimony in the most favorable light, no reasonable jury could find a conspiracy based on that testimony.

There are, however, compelling reasons why the Court should not grant a writ of certiorari on this issue.

First, the district court's application of the *Keogh* doctrine is one of three independent grounds for judgment below. Accordingly, unless the Court reviews and reverses the judgment on the other two grounds, there is no basis for a review of the *Keogh* issue, because this Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956).

Second, the court of appeals' *per curiam* decision is an unpublished summary affirmance. It does not contain an analysis of the *Keogh* doctrine or discuss decisions of other courts of appeals, much less note any conflicts with other decisions. As such, it does not provide a basis for review by this Court.

Third, the decision below is correct. This Court affirmed the continuing validity of the *Keogh* doctrine in its decision in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986).[10] The district court here concluded that the doctrine of *Keogh* and *Square D* bars suits by competitors as well as shippers, relying on *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (barring suit brought in plaintiff's dual capacity as competitor and customer), and on *Pinney Dock & Transport Corp. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988). Although there is disagreement among the courts of appeals concerning the applicability of *Keogh* to suits by competitors,[11] the district court's decision is clearly in accord with the under-

[10] More recently, the Court affirmed, in a different context, the vigor of the filed rate doctrine that underlies *Keogh*. *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

[11] *Compare Pinney Dock*, 838 F.2d at 1457 *with In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144, 1161 (3d Cir. 1993), *pet. for cert. filed sub nom. Bessemer & Lake Erie R.R. v. Republic Steel Corp.*, (No. 93-643, filed October 25, 1993).

lying rationale of the *Keogh* decision. Pet. A36-A37. There is thus no reason to disturb the result below. Also, this Court had the opportunity to review *Pinney Dock*, and denied certiorari. There is no reason to reach a different result here.

CONCLUSION

Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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